

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

3
4 STATE OF CALIFORNIA, by and through
5 Attorney General Xavier Becerra,

6 Plaintiff,

7 v.

8 WILBUR L. ROSS, JR., in his official
9 capacity as Secretary of the U.S. Department
10 of Commerce; U.S. DEPARTMENT OF
11 COMMERCE; RON JARMIN, in his official
12 capacity as Acting Director of the U.S.
13 Census Bureau; U.S. Census Bureau; DOES
14 1-100,

15 Defendants.

Case No. 3:18-cv-01865

16
17 CITY OF SAN JOSE, a municipal corporation;
18 and BLACK ALLIANCE FOR JUST
19 IMMIGRATION, a California Non-Profit
20 Corporation,

21 Plaintiffs,

22 vs.

23 WILBUR L. ROSS, JR., in his official capacity
24 as Secretary of the U.S. Department of
25 Commerce; U.S. DEPARTMENT OF
26 COMMERCE; RON JARMIN, in his official
27 capacity as Acting Director of the U.S. Census
28 Bureau; U.S. CENSUS BUREAU,
29 Defendants.

Case No. 5:18-cv-02279

NOTICE

30 Plaintiffs City of San Jose, Black Alliance for Just Immigration, and the State of
31 California ("Plaintiffs") file this notice in response to the notice filed by Defendants on October
32 10, 2018 (Dkt. 87 in 18-cv-01865 and Dkt. 95 in 18-cv-02279) ("Defendants' Notice").
33 Defendants did not seek to meet-and-confer with Plaintiffs nor make any effort to seek consent to
34 file a joint notice before unilaterally filing their request for a conference to extend the deadlines
35 previously consented to in this matter. Plaintiffs do not consent to any extension of any deadlines
36 in this matter except as set forth below, and do not believe that a conference is necessary.

Defendants notified this Court that Justice Ginsberg, on behalf of the Supreme Court of the United States, issued a brief stay of three discovery orders issued in *State of New York v. U.S. Department of Commerce*, Nos. 18-cv-2921 & 18-cv-5025 (JMF) (S.D.N.Y.) (“the New York litigation”), dated July 3, 2018, August 17, 2018, and September 21, 2018. Justice Ginsberg’s order, which Defendants omitted from their submission, is attached hereto as **Exhibit 1** (“SCOTUS Order”). The SCOTUS Order stayed three orders of the District Court of the Southern District of New York: one of which granted extra-record discovery, one of which granted the deposition of John Gore, and one of which granted the deposition of Wilbur Ross.

Defendants assert that discovery authorized by this Court’s August 17, 2018 order (Dkt. 72 in 18-cv-01865 and Dkt. 87 in 18-cv-02279) is similarly stayed. However, Defendants have not requested a stay from this Court, and the SCOTUS Order does not mention this litigation.

When the Supreme Court issued its order, two fact depositions had been noticed to take place before the close of discovery today on October 11, 2018. Both had been noticed or cross-noticed by Plaintiffs in this case—in fact one was scheduled to take place at the offices of the San Jose/BAJI Plaintiffs’ counsel. The parties in all six coordinated cases made plans to participate in the depositions. Defendants confirmed the depositions, and were aware that they involved interstate travel, as late as Tuesday afternoon. *See* email from Defendants’ counsel dated October 9, 2018, attached hereto as **Exhibit 2**.

Given the coordination and attention that had been put into scheduling the depositions, and the fact that a stay of discovery in these matters had neither been sought nor granted, Plaintiffs’ counsel reached out to Defendants’ counsel to suggest that those depositions scheduled prior to the close of discovery—with the obvious exception of Gore and Ross, which are the subjects of the mandamus petition—take place as planned. Defendants replied that while they would take the opportunity to depose the three Plaintiffs’ experts scheduled for this week (two of which are experts in this matter), they would not produce the previously-scheduled fact witnesses. Defendants claimed that they “understand Justice Ginsburg’s order to include a stay of further fact discovery.” *See* email from Defendants’ counsel dated October 10, 2018, attached hereto as **Exhibit 3**.

1 Plaintiffs had no option but to consent to Defendants' request, as the close of discovery is
2 upon us. But Plaintiffs do not, and will not, consent to any change in any other deadline in this
3 case. Time is critical in this matter: Plaintiffs made every effort and gave Defendants ample
4 opportunity to comply with their discovery obligations in time.

5 In the event that the Supreme Court denies Defendants' petition, Plaintiffs are ready to
6 depose Messrs. Ross and Gore and expect the witnesses to be promptly produced. Negotiations
7 are currently under way to secure a provisional date for Gore as soon as next week, so there is no
8 reason for delay even if the Supreme Court denies mandamus in its entirety. Plaintiffs remain
9 ready to depose the remaining fact witnesses whose depositions were previously noticed and
10 scheduled. Plaintiffs' and Defendants' counsel have generally worked cooperatively to schedule
11 depositions in this matter in a timely fashion, and there is no reason to believe that the remaining
12 depositions cannot be scheduled promptly.

13 Plaintiffs therefore request that this Court affirm the scheduling order set in this case, as
14 recently modified by joint stipulation by the parties (Dkt. 86 in 18-cv-01865 and Dkt. 94 in 18-
15 cv-02279), with the exception that those depositions that were scheduled this week take place
16 immediately after the stay imposed by the SCOTUS Order is lifted, and that any documents
17 produced by Defendants after the close of discovery in the New York litigation be produced in
18 this matter.

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1 Plaintiffs contend there is no need for a conference and no need to further extend
2 deadlines in this matter.

3 Dated: October 11, 2018

MANATT, PHELPS & PHILLIPS, LLP

4
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16 *California, by and through Attorney*
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Attorneys for Plaintiffs
CITY OF SAN JOSE and
BLACK ALLIANCE FOR JUST IMMIGRATION

EXHIBIT 1

Supreme Court of the United States

No. 18A375

IN RE DEPARTMENT OF COMMERCE, ET AL.

O R D E R

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the orders of the United States District Court for the Southern District of New York, dated July 3, 2018, August 17, 2018, and September 21, 2018, are stayed pending receipt of a response, due on or before October 11, 2018, by 4 p.m., and further order of the undersigned or of the Court.

/s/ Ruth Bader Ginsburg
Associate Justice of the Supreme
Court of the United States

Dated this 9th
day of October 2018.

EXHIBIT 2

Dalin-Peters, Nancy

From: Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>
Sent: Tuesday, October 09, 2018 1:29 PM
To: Case, Andrew; Ehrlich, Stephen (CIV); Federighi, Carol (CIV); Coyle, Garrett (CIV); Wells, Carlotta (CIV)
Cc: 'Andrea Senteno'; Abarca, Sharon; Rosenberg, Ezra; 'Todd Grabarsky (Todd.Grabarsky@doj.ca.gov)'; 'Matthew Wise (Matthew.Wise@doj.ca.gov)'; 'Gabrielle.Boutin@doj.ca.gov'; 'Raines, Chase'; 'Duraismamy, Shankar (sduraismamy@cov.com)'; Adams, Rory; McGuinness, John; 'Freedman, John A. (John.Freedman@arnoldporter.com)'; 'Goldstein, Elena (Elena.Goldstein@ag.ny.gov) (Elena.Goldstein@ag.ny.gov)'; 'TThomas@cov.com'
Subject: RE: New documents and Park-Su

Thank you again, Andrew. My colleague Garrett Coyle, copied here, will be handling Ms. Park-Su's deposition, and will be able to provide you an estimate count of attendees and confirm the preferred time.

Safe travels to DC!

Kate Bailey
Trial Attorney
United States Department of Justice
Civil Division – Federal Programs Branch
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Room 7214
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From: Case, Andrew [mailto:ACase@manatt.com]
Sent: Tuesday, October 09, 2018 1:24 PM
To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>
Cc: 'Andrea Senteno' <asenteno@MALDEF.org>; Abarca, Sharon <SAbarca@manatt.com>; Rosenberg, Ezra <erosenberg@lawyerscommittee.org>; 'Todd Grabarsky (Todd.Grabarsky@doj.ca.gov)' <Todd.Grabarsky@doj.ca.gov>; 'Matthew Wise (Matthew.Wise@doj.ca.gov)' <Matthew.Wise@doj.ca.gov>; 'Gabrielle.Boutin@doj.ca.gov' <Gabrielle.Boutin@doj.ca.gov>; 'Raines, Chase' <Chase.Raines@arnoldporter.com>; 'Duraismamy, Shankar (sduraismamy@cov.com)' <sduraismamy@cov.com>; Adams, Rory <RAdams@manatt.com>; McGuinness, John <JMcGuinness@manatt.com>; 'Freedman, John A. (John.Freedman@arnoldporter.com)' <John.Freedman@arnoldporter.com>; 'Goldstein, Elena (Elena.Goldstein@ag.ny.gov) (Elena.Goldstein@ag.ny.gov)' <Elena.Goldstein@ag.ny.gov>; 'TThomas@cov.com' <TThomas@cov.com>
Subject: RE: New documents and Park-Su

Kate,

Thank you on both points.

I also wanted to check in regarding Thursday's Park-Su deposition. It is scheduled for Manatt's DC office (1050 Connecticut Ave, NY, Suite 600). While we do not need a list of names to get through security, it would be helpful to know who is attending from your end to get an accurate count and ensure we are in the right room.

We have noticed the depo for 9:00, but can move that time slightly if it is more convenient for you or Ms. Park-Su.

I hope you are well and look forward to seeing you (or whomever will be at the deposition) on Thursday.

Thank you,

Andrew

Andrew Case
Associate

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From: Bailey, Kate (CIV) [<mailto:Kate.Bailey@usdoj.gov>]

Sent: Tuesday, October 09, 2018 1:18 PM

To: Case, Andrew; Ehrlich, Stephen (CIV); Federighi, Carol (CIV)

Cc: 'Andrea Senteno'; Abarca, Sharon; Rosenberg, Ezra; 'Todd Grabarsky' (Todd.Grabarsky@doj.ca.gov); 'Matthew Wise' (Matthew.Wise@doj.ca.gov); 'Gabrielle.Boutin@doj.ca.gov'; 'Raines, Chase'; 'Duraismamy, Shankar' (sduraismamy@cov.com); Adams, Rory; McGuinness, John; 'Freedman, John A.' (John.Freedman@arnoldporter.com); 'Goldstein, Elena' (Elena.Goldstein@ag.ny.gov) (Elena.Goldstein@ag.ny.gov); 'TThomas@cov.com'

Subject: RE: New documents and Park-Su

Thank you for your email, Andrew. Regarding your questions:

- COM_DIS00013899 was an attachment to the email that directly precedes it in the production (i.e., ending in Bates 13898)
- COM_DIS00014052 is attached, unredacted. Although we do not agree with the analysis in J. Furman's order from Friday, November 5, we recognize that analysis could arguably apply to this email and have produced it in a spirit of compromise.

Have a great afternoon,

Kate Bailey
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From: Case, Andrew [<mailto:ACase@manatt.com>]

Sent: Friday, October 05, 2018 9:34 PM

To: Bailey, Kate (CIV) <katbaile@CIV.USDOJ.GOV>; Ehrlich, Stephen (CIV) <sehrlich@CIV.USDOJ.GOV>; Federighi, Carol (CIV) <CFederig@CIV.USDOJ.GOV>

Cc: 'Andrea Senteno' <asenteno@MALDEF.org>; Abarca, Sharon <SAbarca@manatt.com>; Rosenberg, Ezra <erosenberg@lawyerscommittee.org>; 'Todd Grabarsky' (Todd.Grabarsky@doj.ca.gov)' <Todd.Grabarsky@doj.ca.gov>; 'Matthew Wise' (Matthew.Wise@doj.ca.gov)' <Matthew.Wise@doj.ca.gov>; 'Gabrielle.Boutin@doj.ca.gov' <Gabrielle.Boutin@doj.ca.gov>; 'Raines, Chase' <Chase.Raines@arnoldporter.com>; 'Duraismamy, Shankar' (sduraismamy@cov.com)' <sduraismamy@cov.com>; Adams, Rory <RAdams@manatt.com>; McGuinness, John <JMcGuinness@manatt.com>; 'Freedman, John A.' (John.Freedman@arnoldporter.com)' <John.Freedman@arnoldporter.com>; 'Goldstein, Elena' (Elena.Goldstein@ag.ny.gov) (Elena.Goldstein@ag.ny.gov)' <Elena.Goldstein@ag.ny.gov>; 'TThomas@cov.com' <TThomas@cov.com>

Subject: New documents and Park-Su

Kate,

Thank you for prioritizing the Park-Su documents in advance of next week's deposition. I have reviewed the small production yesterday and have two questions.

First, regarding COM_DIS00013899 (a set of the questions posed from DOC to Census and the answers) could you let us know if this was an attachment to an email (and if so which email) or a stand-alone document? Thank you.

Second, could we meet and confer on COM_DIS00014052? It is redacted in the log as "Draft statement for the Secretary. Non-final language under discussion." If it is draft language of a public statement, it would seem to be in the same category as the draft press statements we have seen before, which eventually were ordered produced. If it is a draft statement regarding the citizenship question, it would seem to be post-decisional (it is dated May 15). If it is something else, we should discuss. Time is short before the deposition but we think this document is worth discussing.

I can talk this weekend or Monday if you are available. I hope you are well.

Andrew

Andrew Case

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EXHIBIT 3

Dalin-Peters, Nancy

From: Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>
Sent: Wednesday, October 10, 2018 12:08 AM
To: Case, Andrew; Federighi, Carol (CIV); Coyle, Garrett (CIV); Ehrlich, Stephen (CIV)
Cc: 'Goldstein, Elena (Elena.Goldstein@ag.ny.gov) (Elena.Goldstein@ag.ny.gov)'; McGuinness, John; 'Thomas, Tina (TThomas@cov.com)'; 'Niyati Shah (nshah@advancingjustice-aajc.org)'; 'Colangelo, Matthew (Matthew.Colangelo@ag.ny.gov)'; 'Gersch, David P. (David.Gersch@arnoldporter.com)'; 'Freedman, John A. (John.Freedman@arnoldporter.com)'; 'pbduke@cov.com'; 'asenteno@MALDEF.org'; 'Denise M. Hulett (dhulett@maldef.org)'; 'Todd Grabarsky (Todd.Grabarsky@doj.ca.gov)'
Subject: Re: Depositions This Week

Andrew,

Thank you for writing to confirm next steps for this week's schedule.

We agree with you that Justice Ginsburg's order does not affect discovery related to standing, and you are correct that we did not seek a stay of discovery related to Plaintiffs' standing. Accordingly, we will proceed as planned with the scheduled depositions of Plaintiffs' experts and the remaining individual members of plaintiff organizations.

Regarding the depositions of Langdon and Park-Su, on the other hand, we do understand Justice Ginsburg's order to include a stay of further fact discovery, as such discovery was initially authorized by Judge Furman's July 3rd order and later authorized to the same extent by Judges Seeborg and Hazel. Mr. Langdon and Ms. Park-Su will thus not be made available while the Supreme Court's stay is in place but, should the Court ultimately deny Defendants' mandamus petition, the four remaining fact deponents will promptly be made available, including after the scheduled close of discovery, if necessary.

Thank you for your understanding and flexibility.

Kate Bailey

----- Original message -----

From: "Case, Andrew" <ACase@manatt.com>
Date: 10/9/18 10:19 PM (GMT-05:00)
To: "Bailey, Kate (CIV)" <katbaile@CIV.USDOJ.GOV>, "Federighi, Carol (CIV)" <CFederig@CIV.USDOJ.GOV>, "Coyle, Garrett (CIV)" <gcoyle@CIV.USDOJ.GOV>, "Ehrlich, Stephen (CIV)" <sehrlich@CIV.USDOJ.GOV>
Cc: "'Goldstein, Elena (Elena.Goldstein@ag.ny.gov) (Elena.Goldstein@ag.ny.gov)'" <Elena.Goldstein@ag.ny.gov>, "McGuinness, John" <JMcGuinness@manatt.com>, "'Thomas, Tina (TThomas@cov.com)'" <TThomas@cov.com>, "'Niyati Shah (nshah@advancingjustice-aajc.org)'" <nshah@advancingjustice-aajc.org>, "Colangelo, Matthew (Matthew.Colangelo@ag.ny.gov)'" <Matthew.Colangelo@ag.ny.gov>, "Gersch, David P. (David.Gersch@arnoldporter.com)'" <David.Gersch@arnoldporter.com>, "Freedman, John A. (John.Freedman@arnoldporter.com)'" <John.Freedman@arnoldporter.com>, "pbduke@cov.com" <pbduke@cov.com>, "'asenteno@MALDEF.org'"

<asenteno@MALDEF.org>, ""Denise M. Hulett (dhulett@maldef.org)"" <dhulett@maldef.org>, ""Todd Grabarsky (Todd.Grabarsky@doj.ca.gov)"" <Todd.Grabarsky@doj.ca.gov>
Subject: Depositions This Week

Kate,

We saw the order staying certain orders in the New York cases tonight. We are writing regarding the fact depositions noticed by the California and Maryland plaintiffs and the expert depositions that you have planned over the next few days.

The California and Maryland plaintiffs have noticed the deposition of David Langdon tomorrow and Sahra Park-Su for Thursday. Both were noticed pursuant to Judge Seeborg's 8/17 order and Judge Hazel's 8/20 and subsequent orders, none of which have been stayed.

In addition, there are expert depositions scheduled over the next few days, including Thompson (tomorrow), Barreto (Thursday), Habermann (Friday), and Abowd (Friday). You argued in your 9/21/18 mandamus reply in the Second Circuit that you were not seeking relief from orders that "permit expert discovery on collateral matters such as plaintiffs' standing." These experts have been made available after careful coordination. Numerous attorneys are now in transit to conduct and defend these depositions, and we cannot guarantee that these experts will be available again.

We therefore understand that the expert and fact depositions (aside from Ross and Gore) scheduled for the next few days will go forward as scheduled.

Thank you,

Andrew

Andrew Case

Associate

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CERTIFICATE OF SERVICE

Case Name: **State of California, et al. v.** No. **3:18-cv-01865**
Wilbur L. Ross, et al.

I hereby certify that on October 12, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

NOTICE

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 12, 2018, at Sacramento, California.

Tracie L. Campbell

Declarant

/s/ Tracie Campbell

Signature